California Western Law Review

Volume 21
Number 2 *CIVIL RICO SYMPOSIUM*

Article 5

1985

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## INTRODUCTION

Consider the following hypothetical situation. An individual who was the chief executive officer and sole shareholder of a corporation which offered various types of investments to the public engaged in a scheme to defraud. The monies which were collected from the investors were used, in part, to make investments on behalf of the investors; in part to create an aura of respectability for the corporation by the purchase of various buildings and the leasing of automobiles; in part, to pay back previous investors; and through various diversions, to purchase for the individual various assets such as houses, boats, cars, airplanes, stock investments, other businesses, diamonds, and the like. When the investment scheme collapsed, various investors complained to the State Attorney General's Office and the United States Attorney, and those prosecuting agencies decided to pursue a criminal case against the individual. The private investors, however, were left with the prospect of having to pursue the individual in a private lawsuit to recover their losses. The investors filed the standard civil lawsuit alleging violations of the various securities laws as well as various statutory and common law theories of fraud.[1] The investors *also* consider filing a lawsuit under Title 18 U.S.C., section 1961, and following (commonly referred to as the "RICO" statute), to seek the treble damages provided for under 18 U.S.C. section 1964(c).[2]

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1. Generally, suits are brought pursuant to the Securities Exchange Act of 1934, and the Securities Act of 1933, as well as common law breach of fiduciary duty, breach of contract and fraud theories. Moreover, suits are brought pursuant to state securities laws ("blue sky laws").

2. 18 U.S.C. § 1964(c) (1982) provides:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United

The question which can be legitimately raised is whether under 18 U.S.C. section 1964(a), the same investors are entitled to a judicial declaration that the individual must divest himself of all of his assets which were obtained through the pattern of racketeering activity prohibited by the RICO statute, and further order that he turn over the assets to the investors for liquidation and distribution.[3]

In addition to the damage remedies which are provided for under 18 U.S.C. section 1964(c), a strong argument can be made for the invocation of various equitable remedies under 18 U.S.C. section 1964(a), and, in particular, the equitable remedy of divestiture which it specifically calls for.[4] Section 1964(a) does not by its terms limit itself to actions which are brought by the United States. To the contrary, that particular subsection states that the United States courts can order divestiture; there is nothing in the subsection which prohibits an individual from asking for divestiture; and there is nothing in the subsection which states that only the United States can ask for divestiture.[5]

To date, two cases have held that divestiture is not available to a private plaintiff under 18 U.S.C. section 1964(a), *Kaushal v. State Bank of India*[6] and *DeMent v. Abbott Capital Corporation*.[7] The purpose of this Article is to state a case for divestiture for the private plaintiff under 18 U.S.C. section 1964(a).

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States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Along with federal RICO, several states have enacted state "Little" RICO statutes. For example, *see* ARIZ. REV. STAT. ANN. § 13-2312 (1978); N.J. STAT. ANN. § 2C:41 (West 1982); as well as at least twenty other states.

3. 18 U.S.C. § 1964(a) (1982) provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

4. *Id.*

5. *See supra* note 3 and accompanying text.

6. The case of Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983), has been discussed and rejected in Chambers Dev. Co. v. Browning-Ferris Ind., 590 F. Supp. 1528 (W.D. Pa. 1984), wherein the district court held that the equitable remedies of § 1964(a) were available to private plaintiffs. Divestiture was not specifically addressed by the court. *See also* AETNA Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983).

7. 589 F. Supp. 1378 (N.D. Ill. 1984).

## I. HISTORICAL BACKGROUND

In the past the word "divestiture" has been used synonomously with "forfeiture."[8] As will be fully explored later, the words should probably not be used in the same sense.[9]

The forfeiture concept orginated both in Mosaic and Grecian law. Under those two systems, if a thing, as opposed to a human being, caused the death of a human, the thing causing the death would be taken by the state and destroyed.[10] In ancient Anglo common law, the doctrine of "deodand" developed where if any personal chattel, animate or inanimate, was the immediate instrument causing the death of a human, it was forfeited to God through his agent, the king, for sale. A distribution was then made in alms to the poor.[11] The Anglo common law forfeiture concept evolved to the point that in the 1700's, conviction of a crime meant, in addition to imprisonment, that the offender's real and personal property was all forfeited to the king, no matter whether the property was used in the illegal act or caused the illegal act to occur.[12] In addition to complete forfeiture, there was imposed upon the offender the "corruption of blood," which meant that all his heirs were cut off completely and could inherit nothing through the offender.[13]

Obviously, this forfeiture doctrine could be subject to abuse by officials of the king, as the American colonists found out. Because of their experience with the English kings and their forfeitures, the framers of the Constitution enacted Article III, Section 3 of the Constitution, and the First Congress in 1790 enacted what is now 18 U.S.C. section 3653.[14] They read as follows: "The Congress shall have Power to declare the Punishment of Treason, but no At-

8. Divestiture is defined as following: "In anti-trust law, the order of court to a defendant (e.g. corporation) to divest itself of property, securities or other assets." BLACK'S LAW DICTIONARY 429 (5th ed. 1979). Forfeiture is defined as following: "Something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty. A deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition. Loss of some right or property as a penalty for some illegal act. Loss of property or money because of breach of a legal obligation. *Id.* at 584 (citation omitted).

9. *See infra* notes 10-42 and accompanying text.

10. Grant Co. v. United States, 254 U.S. 505 (1921).

11. Fields v. Metropolitan Life Ins. Co., 147 Tenn. 464, 466, 249 S.W. 795, 797 (1923); Daniels v. Homer, 139 N.C. 219, 223, 51 S.E. 992, 995 (1905); Blakey, *RICO's Enforcement Provision: An Interpretative Analysis*, 15 SUFFOLK U.L. REV. 941, 949 (1981) [hereinafter cited as Blakey, *An Interpretative Analysis*].

12. Nixon v. Administrator of Gen. Services, 433 U.S. 425, 473 n.35 (1977); United States v. Cauble, 706 F.2d 1322, 1345 n.84 (5th Cir.), *reh'g denied*, 714 F.2d 137 (1983).

13. Nixon v. Administrator of Gen. Services, 433 U.S. 425, 473 n.35 (1977).

14. 18 U.S.C. § 3653 (1982). United States v. Cauble, 706 F.2d 1322, 1345 n.84 (5th Cir. 1983); United States v. Martino, 681 F.2d 952, 959 n.23 (5th Cir. 1982). Both of these cases discuss the relationship of the colonist's reaction to forfeitures and the passage of the RICO legislation.

tainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attained."[15] "No conviction or judgment shall work corruption of blood or any forfeiture of estate."[16]

A reading of these two brief enactments would lead one to the conclusion that forfeiture, as a sanction, was eliminated from American jurisprudence. Such is not the case because gradually, forfeitures for specific acts and for specific things worked their way back into the United States Code.[17] Courts have noted that "contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of criminal enterprise."[18] Prior to RICO, all of these forfeiture provisions were *in rem* in nature.[19]

For the first time in American law, RICO changed the nature of forfeitures in that the legislation called for *in personam* forfeitures.[20] This radical change was of concern to the Congress and prompted a letter from then Assistant Attorney General Richard Kleindienst explaining the reasons for the proposed change.[21] Basically, the

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15. U.S. CONST. art. III, § 3.

16. 18 U.S.C. § 3563 (1982).

17. United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979), *reh'g denied*, 672 F.2d 379, *cert. denied*, 459 U.S. 825 (1982). As was noted in the dissent in United States v. Martino:

> Although general forfeitures are historically disfavored, Congress has frequently used the one of specific forfeitures in combating illegal activities. *See, e.g.*, 15 U.S.C. § 11 (forfeiture of property acquired in violation of antitrust laws); 15 U.S.C. § 1177 (forfeiture of property used in connection with illegal gambling); 16 U.S.C. §§ 65, 117(d), 128, 171, 256c, 4081 (forfeiture of guns and other equipment used unlawfully in national parks); 18 U.S.C. § 924 (forfeiture of firearms used illegally); 18 U.S.C. § 1082 (forfeiture of property used in connection with illegal gambling); 18 U.S.C. § 3612 (forfeiture of bribe monies illegally received by public officials); 18 U.S.C. § 3615 (forfeiture of property used in connection with liquor violations); 18 U.S.C. § 3617(d) (forfeiture of vehicles and aircraft seized for a violation of liquor laws); 18 U.S.C. §§ 3618-3619 (forfeiture of conveyances used to introduce intoxicants into Indian territories); 19 U.S.C. § 1306 (forfeiture of an unwholesome imported meat); 19 U.S.C. §§ 1453 & 1492 (forfeiture of property seized in violation of customs laws); 21 U.S.C. § 334 (forfeiture of adulterated food); 31 U.S.C. § 490 (forfeiture of funds illegally withheld by public official); 49 U.S.C. §§ 781 & 782 (forfeiture of vessels, vehicles and aircraft used to transport contraband).

681 F.2d 952, 964 (5th Cir. 1982) (Politz, J., dissenting).

18. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683, *reh'g denied*, 417 U.S. 977 (1974); United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979).

19. United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1979); Blakey, *An Interpretive Analysis*, *supra* note 11, at 950 (1981).

20. United States v. McManigal, 708 F.2d 276, 286 (7th Cir. 1983); United States v. Martino, 681 F.2d 952, 959 (5th Cir. 1982); United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

21. United States v. Martino, 681 F.2d 952, 959 (5th Cir. 1982); *see also* United States v. McManigal, 708 F.2d 276, 286 (7th Cir. 1983); United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

reason for the change was to take the economic incentives out of organized criminal activity and to destroy its economic base by including divestiture provisions in criminal penalties and civil remedies.[22]

Traditionally, because of the history of forfeitures, the abhorrence that American society has had for forfeitures, and the draconian results of a forfeiture, the courts have proceeded cautiously in construing forfeiture provisions.[23] However, in interpreting the RICO forfeiture provisions in light of the historical background related herein, the courts have found:

> 18 U.S.C. section 1963 does not provide a forfeiture of estate upon conviction of activities proscribed by 18 U.S.C. section 1962. On the contrary, the forfeiture authorized by 18 U.S.C. section 1963 is extremely narrow: the statute provides for forfeiture of an interest acquired or maintained in an enterprise through a pattern of racketeering activity, or any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over an enterprise established or operated in violation of 18 U.S.C. section 1962. Succinctly, 18 U.S.C. section 1963(a) provides for forfeiture of an interest in, claim against, or property or contractual right affording a source of control over a section 1962 enterprise.[24]

Again, in light of the historical background, the purpose of the RICO forfeiture provisions is to reach the ill-gotten gains of criminals when they enter or operate an enterprise through a pattern of racketeering activity.[25] "The aim is to *divest* the association of the fruits of its ill-gotten gains."[26] Stated another way, "RICO's essential aim is to strip violators of the fruits of [their] ill-gotten gains."[27]

The historical analysis set forth herein reveals the following. The concept of forfeiture is an ancient one dating from a time when "things" were blamed for crimes, and "things," therefore, could be taken by the king at the expense of the "thing's" owner.[28] The

22. United States v. Turkette, 452 U.S. 576, 584-85 n.7, 591-92 (1981); United States v. Marubeni Am. Corp., 611 F.2d 763, 769 (9th Cir. 1980); United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1037-38, 1042 (1980) [hereinafter cited as Blakey & Gettings, *Basic Concepts*]; Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982) [hereinafter cited as Blakey, *Reflections*].

23. United States v. McManigal, 708 F.2d 276, 286 (7th Cir. 1983).

24. United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979).

25. United States v. Caubel, 706 F.2d 1322, 1346 (5th Cir. 1983).

26. United States v. Turkette, 452 U.S. 576, 585 (1981); Crocker Bank v. Rockwell Int'l, 555 F. Supp. 47, 49 (N.D. Cal. 1982).

27. Furman v. Cirrito, 741 F.2d 524, 532 (2d Cir. 1984).

28. *See supra* notes 10-13 and accompanying text.

"thing" being the instrumentality of the crime lost its right to exist and the owner received no compensation for the taking of the object by the king.[29] The concept evolved to the point that whenever a person committed what was judged to be a criminal act, not only did he or she suffer punishment directly, but all his or her "things" were taken by the king.[30] Not just the "things" that were instrumentalities of the crime taken, but everything owned by the offender was taken, no matter what its origin or its role.[31] The forfeiture was complete because not only did the offender lose his right to possess the "things," but so did all his heirs.[32] The harshness of this evolution of forfeiture prompted the American colonists to abolish the concept of forfeiture totally.[33] Gradually, the older concept of forfeiting the "thing" which was the instrumentality of the crime crept back into American law, and finally became firmly established.[34] Therefore, if a "thing" was used as an instrumentality of a crime, it could be taken by the government through forfeiture proceedings. The evolution of large-scale criminal activity having large financial rewards for organized criminals and far-reaching financial impact on society created a need for statutes which did more than just forfeit or take away those "things" which were the instrumentalities of the crime.[35] Taking away the instrumentalities of the crime did nothing to cripple the large criminal organizations. The seized instrumentality "things" could be, for the most part, easily replaced. There was a need to take the economic incentive out of large, organized, financially-rewarding criminal activity.[36] There was a need to strip the criminal of his ill-gotten gains and to place him or her in exactly the same economic position he or she was in prior to commencing the illicit activity.[37] RICO has provided the vehicle for stripping the person who has profited financially from illicit activity.[38]

It is suggested that, in light of the historical background and the purposes for which RICO was created, the word "forfeiture" is not appropriate in the civil RICO context. RICO does not provide for a forfeiture in the classical sense of that word.[39] Rather, RICO pro-

29. *See supra* notes 10-11 and accompanying text.
30. *See supra* note 12 and accompanying text.
31. *Id.*
32. *See supra* note 13 and accompanying text.
33. *See supra* note 14 and accompanying text.
34. *See supra* note 17 and accompanying text.
35. *See supra* note 23 and *infra* note 82 and accompanying text.
36. *Id.*
37. *Id.*
38. *Id.*
39. 18 U.S.C. § 1963 (1982) requires a tracing of the proceeds of illegal activity and a forfeiture of only those proceeds. 18 U.S.C. § 1962 (1982) establishes the type of property that can be reached.

vides for the "divesting" of the individual of those "things" which he or she derived from illicit activity.[40] There is no total forfeiture of estate, and there is no simple forfeiture of the instrumentality of a crime. Instead, the RICO statutory scheme calls for the weeding out of all ill-gotten gains.[41]

There can be no question that RICO provides that the United States government, as was the case with the king, can bring an action under RICO to divest the convicted criminal of his ill-gotten gains.[42] The question presented in this Article is whether a private individual hurt by the acts of a civil defendant can, under 18 U.S.C. section 1964(a), call for the divestiture of the ill-gotten gains of the defendant and for the distribution of the ill-gotten gains as compensation for the damage caused by the wrongdoer. If there was a forfeiture to the United States government under 18 U.S.C. section 1963(c), there would be no distribution of the liquidation of the "things" forfeited to those victims of the illicit activity.[43] It is submitted that 18 U.S.C. section 1964(a) provides a vehicle whereby those who have been injured by the illicit activity can be compensated through a liquidation of those "things" acquired by the wrongdoer through his illicit activity, thus, providing a sure remedy for those injured.[44]

## II. Availability of Equitable Relief

18 U.S.C. section 1964 contains two subparagraphs which are relevant to this discussion. Subparagraph (a) provides that the United States courts may provide various types of equitable relief.[45] There is no restriction stated in that subparagraph concerning who can apply to the United States court for the relief stated. Subparagraph (c) provides for a private action awarding the successful plaintiff treble damages, attorney's fees and costs of the suit.[46] It is submitted that the combination of subparagraphs (a) and (c) gives any private litigant a cause of action for damages and for equitable relief. There is nothing in the statute itself which refutes this contention.

The United States Supreme Court has recognized that the United States District Courts have general equitable powers. In *Bell v. Hood*,[47] the court stated: "It is . . . well settled that where legal

40. *Id.*
41. *Id.*
42. *See* 18 U.S.C. § 1963(c) (1982) (criminal forfeiture) and 18 U.S.C. § 1964(b) (1982) (civil divestiture).
43. *See infra* notes 86-88 and accompanying text.
44. *See infra* notes 119-23.
45. *See supra* note 3 and accompanying text.
46. *See supra* note 2.
47. 327 U.S. 678 (1946).

rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[48] In *Sullivan v. Little Hunting Park*,[49] the court stated: "Existence of a statutory right implies the existence of all necessary and appropriate remedies."[50] In *Cort v. Ash*,[51] the Supreme Court enumerated the various factors necessary to imply equitable relief pursuant to a statutory grant.

Reference to the legislative history of the RICO legislation provides little or no guidance concerning Congress' intent relative to who could utilize the relief set forth in section 1964(a). Guidance as to what Congress was contemplating at the time the RICO legislation was passed is provided by Professor G. Robert Blakey.[52] In two law review articles, Professor Blakey has set forth the history of the RICO legislation and his views concerning whether equitable relief under section 1964(a) is available to the private litigant.[53] Specifically, in addressing the question whether equitable relief is available to private plaintiffs, Professor Blakey has stated:

> Section 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, and authority that it was necessary to set lest old learning be used to circumscribe new governmental power to seek equitable relief. Nothing in section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief. Indeed, the governmental suits are to be brought on behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c), moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right secured treble damage relief to the general right to sue, Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted into subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construc-

48. *Id.* at 684.
49. 396 U.S. 229 (1969).
50. *Id.* at 239.
51. 422 U.S. 66 (1975).
52. Professor of Law, Notre Dame University; Professor Blakey was Chief Counsel to the United States Senate Subcommittee which drafted Title IX of the Organized Crime Control Act of 1970. Professor Blakey occupied his position on the Senate Subcommittee during the time the Subcommittee was considering the RICO legislation proposals.
53. Blakey & Gettings, *Basic Concepts*, *supra* note 22, at 1009 n.133 (1980). Blakey, *Reflections*, *supra* note 22, at 237, 244-45, 261-62, 266 n.87, 275 n.115, 276 n.117, 330-41 (1982).

> tion clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.[54]

As noted in Professor Blakey's statement above, the RICO legislation specifically calls for a liberal construction in order to effectuate the remedial purposes of the statute.[55]

With the clear language of the statute and the indication that Congress intended that private parties have equitable relief under Section 1964, the courts have split in their decisions concerning whether or not equitable relief is available to private litigants under Section 1964. Equitable relief has been granted in some cases,[56] and others have held specifically that private equitable relief is not available to the private litigant.[57] Other cases while not passing on the issue have indicated *in dictum* there is serious doubt about the availability of equitable relief for nongovernment civil plaintiffs.[58]

The most persuasive arguments for the granting of equitable relief to private plaintiffs under Section 1964(a) are stated by the *Chambers* court as follows:

> One very strong argument in favor of such a holding is set forth in J. Fricano, *Civil RICO—An Antitrust Plaintiff's Considerations*[59]. . . . In that article, Mr. Fricano states:
>
> "Strong arguments can be made that Section 1964(a) was enacted for the benefit of private plaintiffs as well as for the government. The type of equitable relief authorized by Section 1964(b) is different from the type of equitable relief district courts are empowered to grant pursuant to Section 1964(a). Section 1964(b) provides only for temporary injunctive relief, such as restraining orders. The fact that 1964(b) authorizes the Attorney General to seek *temporary* relief is not evidence

54. Blakey, *Reflections*, *supra* note 22, at 331-32, 237 (1982).

55. Section 904(a) of Senate Bill 30 as adopted (RICO legislation) states, "This section provides that the provisions of this title [RICO] shall be liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a), 84 Stat. 942 (1970). *See also* Schacht v. Brown, 711 F.2d 1343, 1353-56 (7th Cir. 1983); United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980); Blakey, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

56. Chambers Dev. Co., Inc. v. Browning-Ferris Indus., 590 F. Supp. 1528 (W.D. Pa. 1984); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982); Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 182, 189 (S.D. W.Va. 1979) (dictum).

57. DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984); and Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983).

58. Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982).

59. Fricano, *Civil RICO: An Antitrust Plaintiff's Considerations*, 52 ANTITRUST L.J. 361 (1983) [hereinafter cited as Fricano].

> that only the Attorney General is permitted to seek permanent forms of relief. . . Indeed, if the availability of injunctive relief were determined by reference to Section 1964(b), rather than Section 1964(a), Section 1964(a) would be superfluous. A reasonable construction of Section 1964, therefore, is that both private litigants and the Attorney General may seek remedies such as divestiture and, in addition, the Attorney General may seek temporary restraining orders.". . .[60]
>
> Another argument in favor of allowing private claimants to seek equitable relief is that RICO specifically contains a statement of purpose that provides that the act should be liberally construed to effectuate its purposes. . . . If a private plaintiff were denied the right to sue for equitable relief, this purpose would be frustrated.[61]
>
> Further support for this finding rests not only in the interpretation of the statutory language of 18 U.S.C. sections 1964(a) and 1964(b), but also in the federal court's inherent power to grant equitable relief to prevent irreparable injury from conduct prohibited by RICO. In a few RICO cases, courts have exercised their inherent equitable powers and granted injunctive relief to a private claimant.[62]
>
> As we believe the drafts of RICO intended for private claimants, as well as the Government, to benefit from the broader forms of relief in furtherance of the purposes behind the Act, we will adopt the holdings of the courts in *Icahn* and *Vietnamese Fishermen's Association*, as well as Mr. Fricano's well-reasoned arguments, and thus hold that private claimants in RICO cases may see equitable relief. As such, we will deny the defendants' motion that Chambers' claim for equitable relief be stricken.[63]

Of course, a way around the debate over whether equitable remedies are available to the private plaintiff under section 1964 is to invoke the general equitable powers of the district court.[64] Also, Professor Blakey, in an extensive footnote, makes the case for equitable relief under various provisions of the Federal Rules of Civil Procedure.[65] Unfortunately, it does not appear that divestiture is

60. *Chambers*, 590 F. Supp. at 1540 (quoting Fricano, *supra* note 59, at 375).

61. *Id.*

62. *Id.* at 1540-41 (citations omitted).

63. *Chambers*, 590 F. Supp. at 1540-41 (W.D. Pa. 1984). *See also* AETNA Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908, 910-911 (E.D.N.Y. 1983).

64. A good example of how this was done can be found in USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982), wherein a private plaintiff brought a § 1964(c) complaint and in a separate cause of action requested an injunction. The court upheld the district court's issuing of an injunction by noting that the injunction was not requested "for the purpose of securing a potential trebled damage award under RICO." 689 F.2d at 96. The court noted that the injunction was issued upon the finding that the plaintiffs would ultimately prevail on a claim based on common law breach of a fiduciary duty. *Id.*

65. Blakey, *Reflections*, *supra* note 22, at 237, 334 n.217 (1982).

one of the equitable remedies which are provided for in the Federal Rules of Civil Procedure. However, Professor Blakey in the following footnote found in the same law review article does make an argument for the imposition of a constructive trust,[66] which is a remedy very similar to divestiture.

## III. ANTITRUST CASES DEALING WITH DIVESTITURE QUESTIONS SHOULD NOT BE DETERMINATIVE OF THE QUESTION

The legislative history of the RICO statutes indicates that they were based in large part upon the federal antitrust statutes. Critics of the above-stated analysis would point to the fact that the courts have held under the antitrust statutes, that divestiture is not available to the private plaintiff.[67]

The ambiguity in the antitrust statutes which these cases attempt to resolve is different from any ambiguity in the RICO statute. The antitrust statute, Clayton Act section 16,[68] expressly provides for *private* injunctive relief and the issue raised in the cases is whether divestiture is a form of injunctive relief.[69] On the other hand, the RICO statute expressly provides for divestiture in 18 U.S.C. section 1964(a), but does not expressly state whether it is available to a private party.[70] Therefore, although the question underlying both statutes is whether divestiture is available to a private plaintiff, the respective answers in the cases are based on unrelated analyses.

The antitrust statutes are concerned with preventing economic concentration by keeping a large number of small competitors in business; the Sherman Act was directed at realized monopolies; and the Clayton Act at business activities which could lead to monopoly—anticompetitive mergers, for example.[71]

RICO, on the other hand, attempts to eradicate organized crime's infiltration of business completely, whether monopolistic or not, and so is concerned with a much broader range of activities. It is directed toward the protection of existing businesses engaged in

66. *Id.* at 340 n.218.

67. Bosse v. Crowell Collier & MacMillan, 565 F.2d 602 (9th Cir. 1977); Calnetics v. Volkswagen of Am., Inc., 532 F.2d 674 (9th Cir. 1976); International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 518 F.2d 913 (9th Cir. 1975) *But see* NBO Indus. Treadway Co., Inc. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636 (S.D.N.Y. 1975).

68. 15 U.S.C. § 26 (1982).

69. *Id.*

70. 18 U.S.C. § 1964(a) (1982) states in pertinent part: "The district courts of the United States shall have jurisdiction to prevent the restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise . . . ."

71. 54 AM. JUR. 2D *Monopolies* § 120 (1971).

interstate commerce from infiltration by elements of organized crime, from being used as vehicles for laundering the proceeds of organized criminal activities, and from being perverted to methods of operation commonly associated with organized crime.[72]

When proposals for RICO legislation were being considered by Congress, the Antitrust Section of the American Bar Association considered how the existing antitrust legislation scheme might be used in a RICO context. The American Bar Association president, Edward L. Wright, said that since experience had shown that suits by private plaintiffs had become an important avenue of enforcement of the antitrust laws, the adoption of as many of the procedures used in the antitrust field as possible in RICO might be a profitable course of action.[73]

The ABA Report to Congress voiced concerns about the possibility that antitrust statutes would be overly restrictive on RICO actions. It noted that there might be certain racketeering influenced conduct which Congress would like to proscribe which could not be reached under the antitrust statutes; in effect, not monopolistic business practices, but some other undesirable business practice, such as laundering racketeering profits. While acknowledging that antitrust remedies might be useful to RICO, it recommended that the legislation be placed in a separate statute to avoid a "commingling of criminal enforcement goals with the goals of regulating competition."[74] One aspect of commingling that concerned the ABA was the "body of precedent—appropriate in a purely antitrust contest—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' "[75]

In *State Farm Fire & Casualty Co. v. Estate of Caton*,[76] the court commented on the legislative history as follows:

> The conclusions that flow from this survey of the legislative history are unavoidable. Certainly Section 1964(c) was modeled after Section 4 of the Clayton Act. It was, however, cast as a separate statute intentionally to avoid the restrictive precedent of antitrust jurisprudence. . . . Further, *the equitable remedies applied in the antitrust area have always been available to the Court.* Therefore, to burden RICO with restrictive antitrust precedent would be contrary to the express legislative history.[77]

Senator McClellan, the bill's sponsor, during the time the proposed legislation was being reviewed by Congress, said:

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72. United States v. Fineman, 434 F. Supp. 189 (E.D. Pa. 1977).
73. S. REP. No. 92-1070, 92d Cong., 2d Sess. (1972).
74. 91st Cong., 1st Sess., 115 CONG. REC. 6994-95 (1969).
75. *Id.*
76. 540 F. Supp. 673, 680 (N.D. Ind. 1982).
77. *Id.* (emphasis added).

> The many references to antitrust cases are necessary because *the particular equitable remedies desired have been brought to their greatest development in this field*, and in many instances, they are the primary precedents for the remedies in the bill. *Nor do I mean to limit the remedies available to those which have already been established.* The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill.[78]

Senator Hruska, another chief proponent of the Bill, also apparently contemplated giving courts as broad a remedial power as possible under RICO. He said he considered the civil remedies of the Bill its most important feature and added:

> I believe that the time has arrived for innovation in the organized crime fight. The bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them into the organized crime field where they have been seldom used before. Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great.[79]

The sponsors of the bill and the ABA Antitrust Section all supported a policy of allowing at least as broad, if not a broader range of remedies under RICO as under the antitrust laws:

> [Section 1964] provides civil remedies for violation of section 1962. Subsection (a) contains broad provisions to allow for reform or corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons.[80]

In *United States v. Du Pont & Co.*,[81] an antitrust suit brought by the Government, Justice Brennan said: "Divestiture has been called the most important remedy of the antitrust law. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of section 7 [Clayton Act] has been found."

If an equitable remedy had been readily available to private plaintiffs in the antitrust cases, it would not be consistent with the comments of Senators McClellan or Hruska to argue that Congress intended to provide for fewer available remedies in RICO than in the antitrust laws. Since Congress intended to provide "enhanced remedies" to combat organized crime, the only logical reading of

78. S.1861 91st Cong., 1st Sess., 115 CONG. REC. 9567 (1969) (emphasis added).
79. S.1861 91st Cong., 1st Sess., 115 CONG. REC. 6993-94 (1969).
80. H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007.
81. 366 U.S. 316, 331 (1961).

the RICO statute must be that congress expanded the private remedies available from the mere "injunctive relief" provided in the antitrust statute to divestiture, injunction, dissolution, or reorganization, as provided in 18 U.S.C. section 1964(a).[82]

Additionally, in a RICO context, divestiture may be a more crucial remedy than in the antitrust context. While in antitrust cases, injunctions prohibiting mergers or acquisitions might be sufficient to redress problems of decreased competition short of outright monopoly, in a RICO context, divestiture is virtually the only remedy appropriate to affectuate the goals of the act.[83] RICO, while developed from the antitrust statutes, has broader goals. The stated purpose of the statute is to eradicate organized crime by providing enhanced sanctions and new remedies to deal with the unlawful activities of organized crime.[84] RICO was put in a separate statute outside the antitrust laws in order to avoid restricting it by the body of precedent found in the antitrust law.[85] Therefore, while private divestiture may not be an appropriate remedy under the antitrust laws, it is necessary to look further to see if divestiture may, nevertheless, be appropriate under the RICO statutes. It follows that the courts should not feel bound by the precedent developed under the antitrust statute, but should begin to develop a new body of law which addresses the particular situations covered by the RICO statute.

## IV. Policy Arguments in Favor of Divestiture

### *A. Reliance on Government Forfeitures is Misplaced*

As noted above, one of the aims of the RICO legislation is to divest the association of the fruits of its ill-gotten gains.[86] If the divestiture cannot be required by the private plaintiff, one has to ask how the divestiture will be accomplished. It is suggested that it is speculative to depend upon the United States government to affect a divestiture and distribute the proceeds to the victims of the crime. The United States government does not have to request an extensive forfeiture under the provisions of Section 1963(a), and the courts may not have to cause a forfeiture under 1963(a) even if one is initiated by the government.[87] The reasons the United States government would not request an extensive forfeiture are probably legion,

82. *See supra* note 78 and accompanying text.
83. *See supra* note 63 and accompanying text.
84. *See supra* note 78-79 and accompanying text.
85. *See supra* notes 74-78 and accompanying text.
86. *See supra* notes 25-27 and accompanying text.
87. United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981). *But see* United States v. L'Hoste, 609 F.2d 796, 812 (5th Cir. 1980), *reh'g denied*, 615 F.2d 383, *cert. denied*, 449 U.S. 833 (1980).

but the primary reason has to be the difficulty of tracing the ill-gotten gains into various locations. No small amount of litigation has been generated by the disputes between the United States government and persons convicted under RICO as to what assets are forfeitable under Section 1963(a).[88]

Moreover, victims would then be at the mercy of the United States government when it came to determining what assets would be forfeited under Section 1963(a). Although the forfeiture under Section 1963(a), once initiated, is possibly mandatory, the civil divestiture provisions under section 1964(a) are not.[89] There is nothing which compels the United States government to initiate a civil divestiture suit or the court to grant such.[90] Therefore, the victims could never depend upon the United States government to initiate such a civil suit to recompense them for the damages caused by the defendant, or the court to award such a divestiture.

Furthermore, one has to inquire what happens to the proceeds of a forfeiture if such a proceeding is initiated by the government. There is nothing under the law which provides that once the proceeds of the racketeering activity have been forfeited to the United States, those proceeds will then be distributed to the victims of the criminal activity, even though Section 1963(c) provides for making "due provision for the right of innocent persons." To the contrary, when a forfeiture is accomplished, all of the assets immediately go to the United States and become the property of the United States. The only possible way that third party victims could obtain relief through a distribution of the proceeds would be for those third parties to initiate a petition in remission, which petition must be passed upon by the Attorney General of the United States.[91] If the Attorney General chooses not to grant the petition for remission, the assets remain forfeited and the victims are severely limited in their remedies to force a remission.[92]

88. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983); United States v. McNary, 620 F.2d 621 (7th Cir. 1980); United States v. Huber, 603 F.2d 387 (2d Cir. 1979).

89. 18 U.S.C. 1964(a) (1982) merely states that: "The district courts of the United States *shall have jurisdiction* to prevent and restrain violations of section 1962 . . . ." *Id.* (emphasis added); the statute does not require divestiture.

90. 18 U.S.C. § 1964(b) states, in pertinent part: "The Attorney General *may* institute proceedings under this section." *Id.* (emphasis added).

91. United States v. L'Hoste, 609 F.2d 796, 812-13 (5th Cir.), *reh'g denied*, 615 F.2d 383, *cert. denied*, 449 U.S. 833 (1980); and United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981). *See also* United States v. Cauble, 706 F.2d 1322, 1346 (5th Cir. 1983).

92. United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981).

### *B. Civil RICO is a Special Statute for Special Situations and Divestiture Fulfills the Purpose of the Statute*

RICO is not a garden-variety statute. Thus, RICO cases should be reserved for serious matters involving significant harm to the complainant rather than bringing RICO charges in every federal civil action involving two or more underlying RICO violations.

Without limiting RICO actions, the statute is unnecessary. Underlying civil "acts" used to form the required "pattern of racketeering activity" can be mail fraud or wire fraud charges.[93] Most state court remedies for fraud, deceit, and misrepresentation charges can be applied by these courts and provide the plaintiff sufficient relief, and in many instances abundant relief far in excess of the RICO provision where punitive damages in addition to actual damages are pleaded and proved.[94] Therefore, RICO must provide some additional reason for being in place as a form of relief.

A RICO case would be useful in a scenario in which a defendant has through a pattern of mail fraud violations taken in money from investors over a period of time. This money, through a variety of manipulations, has been diverted from the stated purpose of the investment into a number of non disclosed or misrepresented projects or accounts or capital goods.[95] In fact, the defendant may have actually used the fraudulently acquired funds in an investment scheme where the equity has grown but has not been returned to investors as originally promised; or, the invested funds have simply been diverted or converted by the defendant. If all plaintiffs band together and bring a RICO action, without divestiture they are limited to treble damage awards. The defendant could retain a significant portion of the ill-gotten gain either by cleverly hiding the assets or by prudent investment of funds over and above any treble damage exposure. In effect, the defendant who is immune from civil divestiture is being encouraged to acquire funds through any of the underlying RICO acts and hide these assets or make prudent investments over and above the treble damage exposure. This lack of ef-

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93. 18 U.S.C. 1961(1)(B) (1979).

94. *See, e.g.*, CAL. CIV. CODE § 3294 (Deering 1983) reads in pertinent part as follows:

> (a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
>
> * * *
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

95. For example, expensive vehicles, Lear jets, villas, jewelry, and the like.

fective remedy for the investors contradicts a fundamental RICO purpose which, as stated in the legislative history, is intended to place the violator back to his financial status quo prior to the commission of the RICO violations.[96] Simply stated, the perpetrator is not supposed to benefit from taking the risk of acquiring funds in violation of RICO nor is he supposed to retain any funds acquired by taking such a risk. Moreover, the economic analysis in the legislative history points to a Congressional desire to protect the legitimate business person who is competing for investment funds with the RICO violator by taking the incentive out of chancing a RICO violation.[97]

In the common investment fraud scenario, the RICO violator who acquires significant capital investment funds through a pattern of racketeering activity can drain legitimate community funds away from the legitimate investment community, rely on a limit in exposure of treble damages among those who actually sue, and thus retain any invested funds or gains in excess of the limit. A reading of the RICO remedies without divestiture seems to contradict the legislative intent of protecting the legitimate competitor to the RICO violator under the capitalistic economic system.[98]

### *C. Properly Controlled, RICO Divestiture in Civil Cases Works No More a Burden on Defendants Than Other Remedies Commonly Used in All Courts*

The tactics employed by plaintiff in a civil RICO action demonstrate that divestiture would not work a harsh or unfair burden on the defendant when compared to other remedies commonly used in civil litigation in state and federal courts. Moreover, as close analysis will demonstrate, the divestiture remedy provides a reason for the RICO statute being apart from the other remedies available to plaintiff which are, without divestiture, not exceptional.

Does a claim of divestiture work an unreasonable hardship upon the defendant? It is suggested the answer is "no" because several present remedies available to victims work the same type of hardship with the full approval of the courts. One should consider attachments, foreclosures, mechanic's liens, receiverships and involuntary bankruptcy filings.[99]

Under the provisions of Rule 64 of the Federal Rules of Civil

96. *See supra* notes 26-27 and accompanying text.
97. *See supra* note 80.
98. *See supra* notes 37-38, 54 and accompanying text.
99. *See, e.g.*, CAL. CIV. PROC. CODE §§ 481.100-225 (Deering 1972 & Supp. 1985) (attachments); CAL. CIV. PROC. CODE §§ 725a-729.010 (Deering 1972 & Supp. 1985) (foreclosures); CAL. CIV. CODE §§ 3109-3154 (Deering 1972 & Supp. 1985); 18 U.S.C. 303 (1982) (involuntary bankruptcy).

Procedure, state court attachment procedure and process controls in federal actions filed in District Courts.[100] The mechanics of pre-judgment attachments are possibly more severe than a RICO divestiture since the attachment applies to *all* property which is held until judgment and then is liquidated to pay the judgment. The divestiture remedy found in RICO only applies to property that has been acquired with the proceeds of the illicit activity.[101]

A common situation with real estate foreclosure actions and counter-claims readily demonstrates how courts have protected parties seeking return of property through judicial foreclosure. Suppose plaintiff sells a building to defendant and carries back a note for a portion of the purchase price secured by a deed of trust. After the sale defendant does not pay on the note and plaintiff seeks foreclosure. Defendant then files an action claiming fraud, deceit and misrepresentation by plaintiff in the sale.[102] When the parties appear in court, the judge must decide whether to permit the foreclosure to continue and thereby deprive the defendant of this property even though defendant may well have linked the alleged fraud to his inability to pay on the note, or, to hold the foreclosure in abeyance and thereby deprive plaintiff of his property for the duration of the litigation. Commonly, the courts have been requiring a bond for the value of the lost income, and sometimes, for the value of the property as well, for the duration of the litigation.[103] Often the cost of this bond is such that the defendant is precluded from holding the subject property during the law suit, and the foreclosure, a technical and speedy action, is allowed to proceed. There is a more harsh result in the above example than in a RICO divestiture since prior to trial the divested property is merely removed from the control and possible dissipation or sequestering, of the defendant. Final separation of the defendant from ownership occurs after a full trial on the merits.

Similarly, mechanics liens offer a method of tying up a property simply upon the filing of a claim for money owed.[104] If, for exam-

100. Granny Goose Foods Inc. v. Teamsters, 415 U.S. 423, 437 n.19 (1974); Diane Holly Corp. v. Bruno & Stillman Yacht Co., 559 F. Supp. 559, 560 (D.N.H. 1983); and Ashland Oil Inc. v. Gleave, 540 F. Supp. 81, 82-83 (W.D.N.Y. 1982).

101. 18 U.S.C. § 1964(a) (1982): provides that, upon a violation of section 1962, the district courts may order a "person to divest himself of any interest, direct or indirect, in any enterprise."

102. For example, nondisclosure of a material defect known to plaintiff or intentional misrepresentation of a material defect.

103. FED. R. CIV. P. 64 (1974) allows for all state court remedies.

104. FED. R. CIV. P. 64 (1974) again, allows for all state court remedies. In the only reported case on the topic, a question was raised whether a mechanic's lien foreclosure is within the ambit of Rule 64. Bricklayers Fringe Benefit Funds v. North Perry Baptist Church of Pontiac, 590 F.2d 207 (6th Cir. 1979). It is submitted that a case should be confined to its facts.

ple, a workman performs services upon a piece of property and is not paid, he can under certain situations, file a mechanic's lien. The lien encumbers the property for the duration of the litigation and until the judgment is discharged or when the lien is not foreclosed on.[105] Defendant, the owner of the property, is placed in the position of being unable to fully utilize the property until the lien is removed or until a bond is posted to secure the lien.[106] Prior to any court determination of liability, property under this system is encumbered and effectively taken from the owner's total control for the pendency of the litigation to protect the plaintiff should the claim prove successful. If the lien is foreclosed the owner loses the property at sale in order to satisfy the amount of the lien.[107]

Receivers are provided for under state and federal law.[108] Appointment of a receiver is proper to preserve property pending final determination of its disposition in supplemental proceedings in and of execution.[109]

Like receivership, the filing of an involuntary Chapter 7 or Chapter 11 bankruptcy petition[110] acts to totally deprive an individual or business of any meaningful control over his or its assets. Complete liquidation[111] divests the individual or business of the assets and turns over the fruits of the divestiture to creditors.

In most fraud actions, except certain contract related situations, punitive damages are permitted and are increasingly sought as a remedy. Many of the underlying RICO acts are similar to fact patterns and violations used to prove punitive actions in state court actions or federal actions wherein pendant state claims are litigated. While RICO damages without divestiture are capped at treble damages for serious violations, a similar set of facts pleaded in non-RICO causes of action would permit an award of punitive damages with limited relation to actual damages. Thus, defendant's claim that divestiture exposes him to harsh or unjust remedies should not be well taken since punitive damages for the same actions can easily extend far beyond the ill-gotten gain by which divestiture is limited.

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105. *See, e.g.*, CAL. CIV. CODE §§ 3144, 3147 (Deering 1983) which provide that the lien remains in force for two years, but if the lien is not foreclosed within two years it is null and void.

106. *See, e.g.*, CAL. CIV. CODE § 3143 (Deering 1983).

107. Summaries of California mechanic's lien law are found in 2 WITKIN, CALIFORNIA PROCEDURE § 139 (2d ed. 1970 & Supp. 1983) and CALIFORNIA MECHANIC'S LIENS AND OTHER REMEDIES (1972 & Supp. 1982).

108. FED. R. CIV. P. 66 (1974) sets forth the federal law for receivership estate administration.

109. Haase v. Chapman, 308 F. Supp. 399, 404 (W.D. Mo. 1969).

110. *See* 11 U.S.C. § 303 (West 1984).

111. Chapter 7 of the Bankruptcy Code provides for complete liquidation.

### D. Conclusion

Divestiture is therefore the only civil remedy that assures that the defendant who violates the RICO statute does not unjustly benefit from his actions.[112]

Divestiture fulfills the statutory intent and legislative history which mandate that the incentive to divert funds from the free-enterprise capitalistic system into RICO schemes be ended.[113]

Divestiture protects the competitor of the violator who is working within the legal system to make his business successful by taking the ill-gotten gain away from the violator in its entirety and putting it back into legitimate channels of commerce.[114]

Divestiture assures victims of the RICO violator of the availability of assets if they are successful in litigation and further provides the incentive to seek redress from the violator.[115]

Divestiture does not work injustice on the defendant charged with a RICO violation since other court approved remedies are as harsh or harsher. Also, abuse of process and malicious prosecution tools limit the motivation to frivolously bring such claims and assure the preservation of the assets in question.[116]

## V. Practical Application of RICO Divestiture

As noted above, the courts are loathe to order divestiture because of the harsh history of forfeitures. If individual or small groups of plaintiffs were to request divestiture under section 1964(a), the courts probably would continue to express loathing of the remedy and deny the requested relief as the courts did in the *Kaushal* and *DeMent* cases.[117] It is suggested that the real value of divestiture, and therefore the key to obtaining such relief from the courts, is in cases involving large groups of investors or victims.

Consider the hypothetical situation posed at the beginning of this Article.[118] Two methods of attacking the culpable individual come to mind which could be combined with RICO civil suits and divestiture to obtain the maximum relief possible.

First, under Rule 23 of the Federal Rules of Civil Procedure a class action could be brought in the name of a group of investors

112. *See supra* notes 93-98 and accompanying text.
113. *See supra* note 98 and accompanying text.
114. *See supra* note 98 and accompanying text.
115. *See supra* notes 37-38, 54, 63, 79 and accompanying text.
116. *See, e.g.*, CAL. CIV. PROC. CODE §§ 391-391.6 (Deering 1972 & Supp. 1985); *see also* 4 WITKIN, SUMMARY OF CALIFORNIA LAW §§ 242-70 (1972 & Supp. 1984).
117. *See supra* note 57.
118. *See supra* note 1 and accompanying text.

who represent all those "similarly situated."[119] A RICO divestiture cause of action could be pled to require the culpable individual or individuals to turn over to the plaintiff class all the assets acquired through the pattern of racketeering activity. Thereafter, the representatives of the plaintiff class could cause the liquidation of the assets and the distribution of the proceeds of the liquidation to the victim investors. It is submitted that such a divestiture order would bring a quick resolution to the question of how to collect the large class action judgment if the culpable individual or individuals were not willing to pay the judgment voluntarily.

An alternative to the class action lawsuit would be the filing of an involuntary bankruptcy petition under Title 11 of the United States Code.[120] The filing of the petition would bring various assets of the "estate" under the jurisdiction of the bankruptcy court.[121] To reach those assets not under the jurisdiction of the bankruptcy court as a result of the operation of Title 11, a bankruptcy trustee could file a RICO complaint against various culpable individuals who have drained assets off for their personal benefit requesting a divestiture of those assets back to the estate.[122] Upon receipt of the assets, the trustee could liquidate them under the provisions of the Bankruptcy Code, and thereafter cause a distribution of the proceeds of the liquidation to the creditor/investors.[123]

Under the provisions of Rule 23 of the Federal Rules of Civil Procedure and the Bankruptcy Code, attorneys can be paid for their efforts on behalf of the group of investors by application to the court for the payments of fees and costs.[124]

Suppose, however, that only a limited number of plaintiffs filed a RICO action seeking divestiture. Would not these "chosen few" be unjustly enriched at the expense of the other investors who did not file at the same time and perhaps secured verdicts after this first group? While there may be some risk here of competing claims among the injured parties, it is suggested that once a plaintiff files an action seeking divestiture, the court could appoint a special

119. FED. R. CIV. P. 23 (1974).
120. 11 U.S.C. § 303 (West 1984).
121. 11 U.S.C. §§ 362(a)(1), 541(a)(1) (West 1984).
122. Such an action would prevent the invocation of the statute of limitations and other technical aspects of the preference action (11 U.S.C. § 547 (West 1984)) and fraudulent transfers actions (11 U.S.C. § 544 (West 1984)) of the Bankruptcy Code.
123. 11 U.S.C. §§ 726, 1123(b)(4) (West 1984).
124. Rule 23 attorneys' fee cases allow the payment of attorneys' fees to successful representatives of the plaintiff class as a cost of litigation. *See generally* J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 23.91 (2d ed. 1984). Attorneys' fees are provided for in proceedings under the Bankruptcy Code, 11 U.S.C. §§ 503-04 (West 1984). Also, attorneys rendering a benefit to the bankruptcy estate can be compensated out of the estate. Randolph v. Scruggs, 190 U.S. 533 (1903); 2 COLLIER ON BANKRUPTCY ¶ 330.05[d] (15th ed. 1984).

master or trustee similar to a trustee in a bankruptcy action who would oversee and preserve the divested property for the benefit of any injured party or potentially successful plaintiff.

Upon filing a civil RICO case, plaintiffs would, with divestiture available to them as a remedy, allege specific items of property, accounts, and other items that they would be required to demonstrate at trial were acquired with ill-gotten gain or through a pattern of racketeering activity. As in a criminal action seeking forfeiture, tracing of assets would be required at trial to substantiate these claims.

At the conclusion of all litigation the subject property would then either be returned intact to the defendant or divided among the successful plaintiffs based upon their demonstrated loss in the RICO litigation. This remedy and procedure is consistent with the legislative intent of depriving the defendant of the "ill-gotten gain" in order to take the incentive out of RICO violations.[125]

## CONCLUSION

RICO was passed to address a perceived problem in the economy of the United States. The pervasive influence of organized crime in the economy dictated the need for strong remedies to cure the disease. Without question the United States Government can cause a person or business to divest himself or itself of ill-gotten gains,[126] and thereby fulfill the purposes of the RICO statutes.

The purposes of the statute will also be fulfilled if the private litigant is given the ability to cause the same type of divestiture. Section 1964(a) provides such a vehicle.

125. *See supra* notes 25-27 and accompanying text.

126. 18 U.S.C. § 1964(b) (1982) provides: "The Attorney General may institute proceedings under this section."